

## The Seal of the State of California is a circular emblem. It features a central figure, Minerva, seated on a rock and holding a grizzly bear. The background shows a landscape with a ship, a city, and a bay. The words "THE GREAT SEAL OF THE STATE OF CALIFORNIA" are inscribed around the border, and "EUREKA" is at the top.

August 23, 2013

<sup>2</sup> The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise noted, all statutory references are to the Government Code.

review, we affirm the dismissal and adopt the Board agent's warning and dismissal letters as the decision of the Board itself supplemented by our discussion below.

### FACTS

For purposes of this appeal we presume Hsu's allegations to be true.<sup>3</sup> Hsu was represented by a CAPS Attorney, Gerald James (James), in a twenty-one (21) day hearing before the State Personnel Board (SPB) on appeal from his dismissal as a staff chemist with the Department of Toxic Substances Control. A decision upholding his dismissal was issued by the SPB on August 5, 2010. CAPS claims that Hsu did not ask for further assistance, while Hsu alleges that CAPS refused to assist him any further. The documentary evidence Hsu submitted indicates that Hsu filed his petition for review of the hearing officer's decision with SPB in pro per with input and advice from James. CAPS also admits to helping Hsu with administrative tasks such as copying documents and physically filing the petition for review on September 18, 2010 with SPB at Hsu's request. CAPS did not represent Hsu in his petition for review. The SPB denied Hsu's petition for review on November 16, 2010.

Sometime prior to June 14, 2011, Hsu was informed by SPB that it would no longer reconsider his case without a writ of mandate from superior court. In an email dated June 14, 2011, Hsu asked James for advice on the deadline for his state court filing. Sometime thereafter, Hsu consulted with a private labor law attorney who told him that CAPS should represent Hsu in the writ of mandate proceeding. On June 21, 2011, Hsu wrote to James stating:

[W]homever I approach likely wishes to know your experience and opinion about the SPB case. Likely, the court also wants to

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<sup>3</sup> At this stage of the proceedings, we assume, as we must, that the essential facts alleged in the charge are true. (*San Juan Unified School District* (1977) EERB Decision No. 12 [prior to January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB]; *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755-H.)

know whether you believe that the SPB case has merit, and whether my case for judicial review has merit, or is merely intended to harass or cause delay. Accordingly, I would like to request a Declaration from you, citing your period of representation . . . and stating, from your knowledge of the facts of the case, (1) whether the SPB case has merit, (2) whether my writ petition, copy attached, has merit, or is intended to harass or cause delay, and (3) why CAPS is not representing me in this petition for judicial review.

Hsu did not receive a response from James. On August 1, 2011, Hsu sent CAPS's Executive Director, Christopher Voigt, a copy of the writ petition he had prepared, along with a request for CAPS to review it and assist in filing it. Hsu also sent CAPS two checks: one for the superior court filing fees and a second in the amount of \$1,000 to cover CAPS's expenses. On August 5, 2011, Hsu wrote to James again asking his opinion about the merits of his case. Hsu asked that he respond by August 10, 2011, because the deadline for filing Hsu's writ petition was approaching. On August 9, 2011, James wrote to Hsu informing him that "CAPS Representation Committee has decided not to proceed to court on your behalf."<sup>4</sup> James also returned the two checks that Hsu had sent to CAPS along with this letter. Also on August 9, 2011, Hsu wrote to James asking him why, if CAPS was his exclusive representative under the Dills Act, it was not representing him in his petition for writ of mandate and why the "*only* attorney familiar with the fact (sic) of case [and] the *only* attorney who can sign the petition for writ of administrative mandamus as my representative" (emphasis in original) was refusing to represent him further. On August 10, 2011, James informed Hsu that CAPS's representation ended the year before in or around August of 2010 when the SPB issued its decision and that CAPS did not owe him a duty of fair representation in disciplinary proceedings and court challenges. James reiterated that CAPS did not represent Hsu and that he would not provide Hsu with a declaration or sign his petition for writ of mandate.

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<sup>4</sup> James also faxed this letter to Hsu on August 9, 2011.

## DISCUSSION

### Timeliness

Under the Dills Act, PERB is prohibited from issuing a complaint “in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.” (Dills Act § 3514.5(a)(1).) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

Hsu filed his unfair practice charge on October 24, 2011. Hsu alleges that: (1) CAPS breached its duty of fair representation because its attorney failed to adequately represent him in the hearing before the SPB, and (2) CAPS breached its duty of fair representation in August 2011 when it refused to file a petition for writ of mandate in superior court.

#### 1. The SPB Hearing

On appeal, Hsu argues that the Board agent failed to address his allegation that CAPS breached its duty of fair representation by James’ alleged violations of the California State Bar’s Rules of Professional Conduct during the SPB hearing. PERB does not have jurisdiction to enforce the Rules of Professional Conduct. The California State Bar is the proper forum to allege violations of the Rules of Professional Conduct. Moreover, SPB issued its decision on August 5, 2010, and Hsu would have known of any conduct by CAPS that allegedly breached the duty of fair representation by that date. Since Hsu’s unfair practice charge was not filed until October of 2011—well over a year after the conduct which forms the basis of his allegations—we conclude that the Board agent properly dismissed Hsu’s allegations regarding James’ alleged conduct during the SPB hearings as untimely.

#### 2. The Writ of Mandate

Hsu further alleges that he did not know that CAPS would no longer represent him until August 10, 2011, when James wrote to him informing him that CAPS would no longer

represent him. The six-month limitations period began to run on the date that Hsu knew or should have known, in the exercise of reasonable diligence, that further assistance from CAPS was unlikely. (*Los Rios College Federation of Teachers, CFT/AFT (Violett, et al.)* (1991) PERB Decision No. 889.) CAPS did not represent Hsu in his petition for rehearing of the SPB decision. As Hsu alleges in his amended charge, “despite Respondent’s continued duty under the Dills Act to provide representation, Respondent would not prepare the petition for rehearing. Thus, Hsu had to prepare the petition himself.” Arguably, Hsu should have been aware that he would receive no further assistance from CAPS after SPB’s final decision on August 5, 2010.

However, we reiterate that when reviewing a Board agent’s dismissal, we view the allegations in the light most favorable to the charging party. The most favorable light would suggest that although CAPS did not represent Hsu after SPB’s final decision on August 5, 2010, CAPS did not make it absolutely clear to Hsu that CAPS would no longer represent him until James’ letter of August 10, 2011. We conclude, therefore, that Hsu has made a timely allegation that CAPS refused to represent him in filing a petition for writ for mandate in superior court, and consider the substance of this allegation below.

#### Duty of Fair Representation

Having determined that Hsu has made a timely allegation regarding CAPS’s refusal to represent him in filing a writ of mandate in superior court, we now address that allegation. Exclusive representatives “owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith.” (*Hussey v. Operating Engineers Local Union No. 3* (1995) 35 Cal.App.4<sup>th</sup> 1213, 1219 (*Hussey*)). However:

There is no duty of fair representation owed to a unit member unless the exclusive representative possesses the exclusive means

by which such employee can obtain a particular remedy. The exclusive representative possesses the sole means by which a unit member has access to the negotiation process, as well as the grievance and arbitration procedure. There are, however, alternative sources of assistance available to a unit member who seeks to enforce statutory rights in a court of law. [Citations omitted.]

(See *California State Employees' Association (Darzins)* (1985) PERB Decision No. 546-S, Warning Letter, at p. 3.) Thus, a union is not obligated to represent bargaining unit members “in cases involving a forum that concerns an individual right unconnected with negotiating or administering a collective bargaining contract.” (*Ibid.*) As PERB has stated:

The right of an employee to appear in front of the SPB is an individual right granted by the California Constitution and unconnected with any aspect of negotiating or administering a collective bargaining agreement.

(See *California State Employees Association (Parisi)* (1989) PERB Decision No. 733-S.) PERB subsequently reiterated that “[t]he duty of fair representation does not extend to extra-contractual hearings such as SPB hearings.” (*California State Employees Association (Finch)* (1992) PERB Decision No. 959-S; see also, *California Union of Safety Employees (John)* (1994) PERB Decision No. 1064-S.) Clearly, CAPS was not obligated to represent Hsu before the SPB and, certainly, they were not obligated to continue their representation in superior court. We find therefore that the Board agent properly dismissed Hsu’s charge regarding CAPS’s refusal to represent him in filing his writ of mandate.

#### The Elements of an Unfair Practice Charge

Lastly, we note here that the warning letter, which we affirm, states that Hsu’s burden under PERB Regulation 32615(a)(5) includes alleging the “who, what, when, where and how” of an unfair practice. This formula has crept into PERB’s jurisprudence through *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944 (*Ragsdale*). While the *Ragsdale* formula may be helpful in warning letters, to assist a charging party to cure a

deficient charge, we reiterate that it is not a “hurdle over which every charging party must leap at the risk of dismissal.” (*National Union of Healthcare Workers* (2012) PERB Decision No. 2249-M (*NUHW*), at p. 15.)

As we noted in *NUHW*, “[w]e favor a more nuanced analysis turning on the elements of the particular prima facie case.” (*Ibid.*) The test for sufficiency of allegations was and is set forth in our regulation, namely, “a clear and concise statement of the facts and conduct alleged to constitute an unfair practice.” (PERB Reg. 32615(a)(5).)

#### ORDER

The unfair practice charge in Case No. SF-CO-61-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Winslow joined in this Decision.





## PUBLIC EMPLOYMENT RELATIONS BOARD



San Francisco Regional Office  
1330 Broadway, Suite 1532  
Oakland, CA 94612-2514  
Telephone: 510-622-1025  
Fax: (510) 622-1027



January 17, 2012

John Hsu

Re: *John Hsu v. California Association of Professional Scientists*  
Unfair Practice Charge No. SF-CO-61-S  
**DISMISSAL LETTER**

Dear Mr. Hsu:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 24, 2011. John Hsu (Charging Party) alleges that the California Association of Professional Scientists (CAPS or Respondent) violated the Ralph C. Dills Act (Dills Act)<sup>1</sup> by breaching the duty of fair representation.

Charging Party was informed in the attached Warning Letter dated January 3, 2012, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it on or before January 10, 2012, the charge would be dismissed. On January 10, 2012, Charging Party filed a First Amended Charge.

The First Amended Charge, supported by forty-nine attachments and exhibits, repeats the allegation made in the original charge filed on October 24, 2011—that Respondent violated the duty of fair representation when it declined, on August 10, 2011, to file a petition for writ of mandate in State superior court on his behalf. In addition, the First Amended Charge alleges that Respondent's attorney violated the duty of fair representation by failing to adequately represent Charging Party during two hearings before the State Personnel Board (SPB).

Allegations Pertaining to Respondent's Conduct in the Course of Two SPB Hearings Are Untimely

Dills Act section 3514.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should

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<sup>1</sup> The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and PERB Regulations may be found at [www.perb.ca.gov](http://www.perb.ca.gov).

have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) A charging party bears the burden of demonstrating that the charge is timely filed. (*State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S; *Tehachapi Unified School District* (1993) PERB Decision No. 1024.)

Charging Party alleges that the attorney for CAPS failed to adequately represent him in two hearings before the SPB—one in 2005, and one ending on November 19, 2009. Both of these hearings occurred more than six months prior to the filing of the charge. Any allegation that Respondent violated the duty of fair representation by its attorney's conduct during the SPB hearings is therefore untimely.

#### The Union's Duty of Fair Representation Does Not Extend to Extra-Contractual Matters

Even if the allegations concerning Respondent's conduct during the SPB hearings were timely filed, Charging Party has not alleged facts showing that an unfair practice has occurred. As was explained in the January 3, 2012 Warning Letter, an exclusive representative does not owe a duty of fair representation to unit members in a forum over which the union does not exclusively control the means to a particular remedy. (*SEIU Local 1000 (George)* (2008) PERB Decision No. 1984-S.) Specifically, the duty of fair representation does not extend to SPB hearings (*California State Employees Association (Finch)* (1992) PERB Decision No. 959-S) or to filing a writ of mandate to overturn an SPB decision (*California State Employees' Association (Darzins)* (1985) PERB Decision No. 546-S).<sup>2</sup>

Because the duty of fair representation did not extend to the SPB hearing or to the filing of a writ petition, Respondent's conduct was not a violation of the Dills Act. For these reasons and for those in the January 3, 2012 Warning Letter, the charge is hereby **DISMISSED**.

#### Right to Appeal

Pursuant to PERB Regulations,<sup>3</sup> Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the

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<sup>2</sup> The text of these PERB decision may be found at [www.perb.ca.gov](http://www.perb.ca.gov).

<sup>3</sup> PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board  
Attention: Appeals Assistant  
1031 18th Street  
Sacramento, CA 95811-4124  
(916) 322-8231  
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32635, subd. (b).)

#### Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

#### Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

M. SUZANNE MURPHY  
General Counsel

By \_\_\_\_\_  
Daniel Trump  
Regional Attorney

Attachment

cc: Gerald James, Attorney

## PUBLIC EMPLOYMENT RELATIONS BOARD



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January 3, 2012

John Hsu

Re: *John Hsu v. California Association of Professional Scientists*  
Unfair Practice Charge No. SF-CO-61-S  
**WARNING LETTER**

Dear Mr. Hsu:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 24, 2011. John Hsu (Charging Party) alleges that the California Association of Professional Scientists (CAPS or Respondent) violated the Ralph C. Dills Act (Dills Act)<sup>1</sup> by breaching the duty of fair representation.

Facts as Alleged

Charging Party was an employee of the California Department of Toxic Substances Control, in a bargaining unit represented by Respondent.

Charging Party alleges that Respondent breached its duty of fair representation when it declined to file a writ of mandate in State superior court on his behalf. CAPS represented Mr. Hsu in an administrative hearing before the State Personnel Board (SPB).<sup>2</sup> When the matter was not resolved in his favor, Mr. Hsu prepared a petition for writ of mandate, and requested that CAPS file it on his behalf. On August 9, 2011 and again on October 21, 2011, a CAPS attorney notified Mr. Hsu that CAPS would not be representing him in the matter.

The Union's Duty of Fair Representation Does Not Extend to Extra-contractual Matters

A union does not owe a duty of fair representation to unit members in a forum over which the union does not exclusively control the means to a particular remedy. (*SEIU Local 1000*)

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<sup>1</sup> The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and PERB Regulations may be found at [www.perb.ca.gov](http://www.perb.ca.gov).

<sup>2</sup> The subject matter and dates of the hearing are not described in the charge. However, Respondent submits that the hearing concerned an appeal from Charging Party's dismissal from employment, that the hearing was twenty-one days, and that SPB issued its decision on August 5, 2010.

(George) (2008) PERB Decision No. 1984-S.) PERB has held that the duty of representation does not extend to filing a writ of mandate to overturn an SPB decision. (*California State Employees' Association (Darzins)* (1985) PERB Decision No. 546-S.)

PERB Regulation 32615(a)(5)<sup>3</sup> requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

Here, Charging Party has alleged only that Respondent's refusal to file the writ of mandate violated the duty of fair representation. Because the duty of fair representation did not extend to this matter, Respondent's refusal to do so was not a violation of the Dills Act.

For these reasons the charge, as presently written, does not state a prima facie case.<sup>4</sup> If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB.

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<sup>3</sup> PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

<sup>4</sup> In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

If an amended charge or withdrawal is not filed on or before **January 10, 2012**,<sup>5</sup> PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

~~Sincerely,~~

Daniel Trump  
Regional Attorney

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<sup>5</sup> A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)